

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

BLUE CROSS BLUE SHIELD
OF MICHIGAN,

Case No: 19-002396-CB
Hon. Brian R. Sullivan

Plaintiff,

-vs-

ALLISON COMBS,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

At a session of said Court, held in the City
County Building, City of Detroit, County of
Wayne, State of Michigan, on
7/3/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff Blue Cross Blue Shield of Michigan (BCBSM) filed a motion for temporary restraining order (TRO) and preliminary injunction against defendant Allison Combs (Combs). MCR 3.310(B),(A). BCBSM seeks to enforce a restrictive covenant in Combs' Director Employment Agreement (Agreement) restricting Combs employment. Combs had been employed at BCBSM for several years when she was promoted to Director of Pharmacy Services and Business Performance and Insights. In that capacity Combs signed a Director Employment Agreement acknowledging that she would be exposed to, and become familiar with, valuable proprietary information of BCBSM. That agreement

contained a non-competition clause which restricted Combs from undertaking any business activities comparable to those she performed on behalf of BCBSM for one year from the date of her termination from BCBSM.

Combs' employment was terminated on June 7, 2018. She received severance pay (\$154,000.00 gross, \$109,000.00 net) and benefits equal to one year salary and other benefits for herself and family. On January 9, 2019 Combs accepted the position of Senior Director of Product for Optum RX, working in the area of product development and innovation. This job includes launching of new pharmacy products, which can be marketed and sold in Michigan.¹ Combs direct work is with Harvard Pilgrim of Massachusetts and Blue Cross of South Carolina, not Michigan.

BCBSM contends Combs is in violation of the non-compete covenant because her position at Optum RX conflicts with her former position at Blue Cross. Combs denies any conflict and contends Optum RX is a subsidiary of Optum Health. Optum Health competes with BCBSM, not Optum RX. Combs further contends there is a difference in the levels and areas the service of the two entities, the positions of each provider and the respective job descriptions. Combs denies any contractual conflict and asks this court to deny the relief plaintiff seeks.

¹Combs sought BCBSM's consent to take the position which was not given. BCBSM further contends that Combs did not fully disclose all the pertinent information about the scope of the duties Combs would assume at Optum RX.

The court concludes Combs is in violation of the covenant not to compete and grants plaintiff's motion for a preliminary injunction.²

FACTS

Combs signed the director employee agreement with a non-compete provision on December 20, 2014:

Non-compete. I agree that during my employment with BCBSM, I have *acquired and will acquire and develop knowledge of confidential information ... specialized experience* and training which could be used unfairly to the advantage of a competitor of the BCBSM entities and/or to the detriment to the BCBSM entities. I therefore agree that, during my employment with BCBSM and for one-year commencing on the date of the termination of my employment, I will not (without the prior written consent of BCBSM) ... accept an employment offer to participate or engage in (as an employee ...) any *business activities comparable to the activities in which I engaged* in on behalf of any of the BCBSM entities *that compete directly or indirectly* with the business interests of any of the BCBSM entities within the State of Michigan. (Section two of the December 14, 2014 agreement).

Combs acknowledged in 2014 when she signed the Director Agreement that her position at BCBSM provided her with access to competitively sensitive business information which was not generally known to the public.

BCBSM is a non-profit mutual insurance company and the largest health insurer in Michigan. Prescription drug coverage is usually a benefit of employment, part of the health package sold by BCBSM. An insurance claim for a pharmacy service by an insured of

²The TRO time passed and the parties hearing was on the injunction.

Blue Cross are processed by Express Scripts, a pharmacy benefit manager of BCBSM. Express Scripts is a company who performs comparable service to Optum RX. There are three major benefit managers in the United States, Express Scripts, CVS Health and Optum RX.

Optum RX is owned by United Health Group, Inc. Optum unified the health services business for United Health. Optum has five divisions including Optum RX, its pharmacy benefits manager.

The briefs and hearing indicate there is no dispute:

- 1) Combs began to work for Blue Cross Blue Shield of Michigan (BCBSM) on January 14, 2008;
- 2) On December 20, 2014 BCBSM promoted Combs to the position of Director of Pharmacy Services Business Performance and Insights;
- 3) As part of that director level role on December 20, 2014 Combs entered into a Director Employment Agreement with BCBSM;
- 4) Defendant agreed she would not engage in any business activities comparable to the activities in which she engaged on behalf of BCBSM or that competes with the business interests of BCBSM within Michigan;
- 5) Combs agreed the period of non-compete was one year after termination;
- 6) Combs agreed to not disclose BCBSM's confidential, proprietary information and trade secrets, for the entire course of her employment, and that information remain undisclosed to any third person without any time limit;
- 7) Combs reaffirmed those obligations when she was terminated and received severance benefits, including one year salary;
- 8) Combs was terminated June 7, 2018 based on a reduction in the work

force;

9) On January 9, 2019 (about seven months into her one year period) Combs informed BCBSM that she had received an offer to work for Optum Rx;

10) On January 10, 2019 BCBSM responded to Combs writing that it concluded that such employment with Optum RX was a breach of her Director Employment Agreement.

11) Optum RX is a subdivision of Optum (United);

12) Combs' employment as Senior Director of Health Plan Strategy and Innovation for Optum RX began January 28, 2019;

13) Optum RX provides a spectrum of pharmacy care services throughout the United States, including Michigan.

LAW

MCL 445.774a(1) states:

Sec. 4a. (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

A contract which merely restrains, monopolizes or restricts employment is not legal as it is a restraint of trade or commerce in the market. MCL 445.72. An agreement to not compete to protect a reasonable competitive business interests can be valid. MCL

445.774(a)(1). An employee is not entitled to obtain an unfair advantage in competition with a former employer. See *St. Clair Medical PC v Borgiel*, 270 Mich App 260, 265 (2006); MCL 445.774a. See also *Rory v Continental Insurance Company*, 473 Mich 457, 475 note 32 (2005).

A hearing was held on March 21, 2019 after limited discovery was completed. The parties provided supplemental briefs to identify the area of employment conflict.

The primary document at the center of this case is the Director Agreement. It states in section one, which Combs acknowledged, that Combs' position as Director of Pharmacy Services provided her with access to competitively sensitive business information, which information is not known to the public.

Blue Cross maintains:

- 1) Combs had broad pharmacy responsibilities including business performance and support in particular for strategic planning, tracking and measuring pharmacy product services and results including new products and services.
- 2) the \$1,500,000,000.00 loss in business from BCBSM to Optum is an indication of the competition between the companies.
- 3) Combs work with Harvard Pilgrim of MA and Blue Cross South Carolina for Optum RX is not restricted to Massachusetts or South Carolina.
- 4) Combs was exposed to confidential and competitive information of Blue Cross during her employment, acknowledged in her agreement where she agreed to not take this information to a competitor of Blue Cross.
- 5) Combs, as Director of Pharmacy Services Business Performance and

Insight was over the pharmacy product strategy team, performance team and the actuarial team.

6) Combs was exposed to sensitive and confidential information at Blue Cross in terms of pharmacy services.

7) Combs was involved in a five year strategic plan with Blue Cross.

8) Combs was on the team for the compilation ideas, initiatives, reported on savings, costs, risks and forecasts.

9) Combs tested her ideas and programs in the marketplace.

10) The three phase program was used to launch initiatives for subsequent present and future.

11) Pharmacy product performance, tracking of products and programs within pharmacy, contracts with plaintiff's pharmacy business manager were all included in Combs' role.

12) Combs had extensive involvement in pharmacy product beginning with their design, launch, implementation and product management.

BCBSM contends Optum RX competes with BCBSM because BCBS provides both medical and pharmacy services to businesses. BCBSM claims this information is highly confidential and, in the hands of a competitor like Optum RX (which has acquired a substantial chunk of business from BCBSM) could adversely impact Blue Cross' business. This scenario is protected by the non-compete with Blue Cross in its contract with Combs.

Combs is a certified strategic management professional. She is highly educated with a Bachelor's of Science (BS) in Biology from the University of Michigan, Master's Degree in Science (MS) in Molecular and Cellular Biology from Eastern Michigan University

and a Master's in Business Administration (MBA) from the University of Michigan, School of Business with specialization in corporate strategy. Combs' affidavit, and the testimony elicited at the hearing, indicates Combs leads (or will lead) product identification development and launch of new products; develop intimate knowledge of the pharmacy services (within a health plan marketplace); new products for Optum; piloting new products, health plan product strategy innovation, pharmacy services in connection with health plans, examine the market trends for new product opportunities; bill financial models for the products, develop market sales and strategies, etc.

The description provided by Combs in her affidavit overlaps with that which BCBSM contracted with her to not compete with it on, nor ever disclose.

Combs asserts that new product development is limited to Harvard Pilgrim (health plan out of Massachusetts) and that would involve products and services for sale by Optum RX on a nationwide basis to healthcare plan clients. She strongly contends she does not compete with BCBSM and there is no conflict. Combs was unable to identify certain aspects of her current work due to confidentiality. Combs denied any conflict with BCBSM.

DISCUSSION

The factors used to determine the reasonableness of a non-competition clause are the duration, scope and type of employment prohibited. MCL 445.77(c)(1). The

reasonableness of the competitive interest justifying the non-compete clause should be examined. MCL 445.774(a)(1); *St. Clair Medical PC, supra*.

The contractual duration of the non-compete to one year is not unreasonable. The type of employment prohibited is that which is in direct conflict with that “comparable” to that of BCBSM. The business interests to be protected are Blue Cross pharmacy information gleaned from Combs’ employment which could be used against BCBSM. This is a reasonable business interest. An employer’s reasonable competitive business interest can include anti-competitive use of employment information gleaned from information and knowledge obtained through an employer’s position. It can be protected by contract from having a competitive impact on the employer’s customer base, costs and pricing of product. See *Mapal, Inc. v Atarsia*, 147 Fed Supp 3rd 670 (ED Mich 2015).

While BCBSM and Optum RX may not be direct competitors as are say Express and Optum RX, BCBSM is still in competition as it traditionally sells healthcare plans with ancillary pharmacy plans. Businesses can elect to medical service coverage only and exclude pharmacy insurance from the health plan they can purchase for BCBSM. The unpurchased pharmacy service can be obtained from Optum RX or any other entity instead of BCBSM. Optum RX is a direct competitor of BCBSM for those pharmacy services. Health plans and pharmacy plans are not always identical nor joined at sale.

The pertinent question in this case is whether the knowledge, training, experience

and information exposure Combs received at BCBSM can be utilized against BCBSM in Combs' new position, such that the covenant in the contract can protect against that competitive interest. The evidence in this case shows that the crossover is sufficient to present that real risk to BCBSM. Moreover, Combs received a year's salary and benefits not just for her termination, but also for not competing with Blue Cross as outlined in that contract. Plaintiff's restriction on the confidentiality of her disclosures may have impacted her ability to present a complete the picture of her job in her testimony. The court concludes that there are distinctions between Optum RX and BCBSM. However, Combs was exposed to business information, proprietary and confidential, at BCBSM, and what Combs agreed vis a vis contract at BCBSM to not disclose it or compete in a comparable job for one year. Combs job at BCBSM Combs is sufficiently related to her job description at Optum RX such that it is within the scope of her agreement not to compete.

This case presents more than just generalized skill or knowledge of the workplace. See *Follmer, Rudzewicz and Company, P.C. v Kosco*, 420 Mich 394 (1984). It is more than mere access to workplace information. Moreover, the covenant doesn't seek to simply prevent defendant from finding employment in the same general industry. It is far more limited in scope. It simply restricts Combs, for a time, from using BCBSM information in a competitive area in direct or indirect competition with it based on what she learned from her work at BCBSM.

MCR 2.210 controls preliminary injunctions. After a hearing, review of affidavits,

pleadings and briefs on the respective positions the court concludes BCBSM has a competitive and legitimate business interest to protect. MCL 445.774a. BCBSM has met its burden that the injunction should issue that the restrictive covenant (non-competition) be enforced. The defendant had access to confidential, proprietary information which applied in the present and future. The job description, qualifications and functions of plaintiff's employment all lead to the conclusion the legitimate business intent of BCBSM can be protected and enforced by enforcement of the restrictive covenant in the Director Agreement. See i.e. *Gateway 2000, Inc v Livak*, 19 F Supp 2d 748 (ED Mich, 1998).

The court concludes:

1. It is likely plaintiff will prevail on the merits;
2. If relief is not granted to BCBSM it will suffer the irreparable injury (some of which will not manifest itself until the future as these projects are performed in advance of hitting the market);
3. The harm to BCBSM outweighs the harm to Combs. Combs has been paid for one year, the term of the non-compete. BCBSM has no vehicle to measure the losses in the market by such disclosure. Such injury is not compensable, as there is not legal measurement of damages to BCBSM with a reasonable degree of certainty. On the balance of all the facts, injury to BCBSM outweighs that to Combs;
4. The injury is actual not potential;
5. The mere breach of contract does not establish damages and the damages are not economic. See *Merrill, Lynch, Pierce, Farmer and Smith, Inc. v EF Hutton Co., Inc.*,

403 F Supp 336 (ED Mich, 1975); *Thermatool Corp v Borzym*, 227 Mich App 366, 376,377 (1998). The harm in this case is more than mere deterioration of a competitive market position.

Plaintiff seeks to extend the covenant period in the contract for the reason defendant continues to work at Optum RX. This remedy is available under *Thermatool*, 227 Mich App at 75. However, before that decision can be made the court must be satisfied all the information on the case is before it,

and;

IT IS SO ORDERED.

/s/ Brian R. Sullivan 7/3/2019
BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: